No. 08-1043

IN THE

Supreme Court of the United States

VALERIE PLAME WILSON, *et al.*,
Petitioners,

v.

I. LEWIS LIBBY, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INDIVIDUAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals, applying decisions of this Court, properly reject petitioners' claims for money damages against respondent public officials, both (1) because Congress already had enacted a comprehensive legislative scheme to address disclosures of the kind alleged, and also (2) because to allow litigation of such claims in this context would risk disclosure of sensitive foreign-intelligence activities?

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STATEMENT

The pertinent allegations of the complaint and the proceedings below are summarized in the opinion of the Court of Appeals, Pet. App. 3a-7a, and in the Brief in Opposition filed herein by the United States.

The Court of Appeals, taking the "two steps" prescribed by this Court in *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2598 (2007), examined first "whether any alternative, existing process," *id.*, protected the interest

asserted in the complaint. It concluded that the interest in privacy was indeed protected, to the extent Congress decided to do so, by the Privacy Act, 5 U.S.C. § 552a. "The claims asserted by the Wilsons are all claims alleging harm from the improper disclosure of information subject to the Privacy Act's protections." Pet. App. 15a. For that reason, even though some of the defendants were excluded from that Act,[1] petitioners were not entitled to claim damages by an extension of *Bivens*[2] to create a cause of action and remedy Congress had not provided. Pet. App. 14a-18a.

The Court of Appeals further, as contemplated in *Wilkie*, recognized alternatively that the complaint presented additional "special factors counselling hesitation before authorizing a new kind of federal litigation." Pet. App. 19a, quoting *Wilkie*, 127 S. Ct. at 2598, quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). It pointed out that "litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information." Pet. App. 21a-22a.

The Court of Appeals after reviewing *Wilkie* and this Court's other cases rejecting *Bivens* claims concluded that "we cannot create a *Bivens* remedy because the comprehensive Privacy Act and the sensitive intelligence information concerns affiliated with this case preclude us from doing so." Pet. App. 10a.

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[1] Petitioners do not contest that they could have brought a claim concerning respondent Armitage under the Privacy Act, but did not do so. See Pet. 16; Pet. App. 20a.

[2] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals, affirming the District Court, applied an analysis well established in repeated decisions of this Court. There are no decisions of any court of appeals to the contrary.

1. Petitioners seek certiorari to argue for an unprecedented expansion of the doctrine first created in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). They claim entitlement to recover money damages from public officials for alleged constitutional violations "when no federal statute applies or provides any possible remedy for plaintiffs." Pet. Cert. i.

In the decades after *Bivens*, however, this Court on several occasions has declined to extend *Bivens* to allow civil damages when Congress has not so provided. *E.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988) ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts."); *Wilkie*, 127 S. Ct. at 2600 ("in most instances we have found a *Bivens* remedy unjustified"); *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001) ("Since *Carlson* [in 1980], we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). Earlier this week this Court reminded that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft* v. *Iqbal*, No. 07-1015 (May 18, 2009), slip op. at 11, quoting in part *Malesko*, 534 U.S. at 68. See also *United States* v. *Stanley*, 483 U.S. 669, 683 (1987) ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books

afford [the plaintiff] . . . an 'adequate' federal remedy for his injuries.").[3]

2. Petitioners argue that they should not "be precluded from suing [for money damages] for constitutional violations when they are left with no remedies under *Bivens* at all." Pet. 21. But as to one of the respondents, remedies would exist under the Privacy Act. See Pet. App. 20a. And as to petitioners' broader assertion, that every constitutional claim must have a remedy in money damages, this Court already has clearly answered in the negative. "The absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker* v. *Chilicky*, 487 U.S. at 421-22. "[A]ny freestanding damages remedy for a claimed constitutional violation . . . is not an automatic entitlement . . . and in most instances we have found a *Bivens* remedy unjustified." *Wilkie* v. *Robbins*, 127 S. Ct. at 2597.

3. Petitioners detect supposed "great disagreement," in the courts of appeals. Pet. 15. None exists, and petitioners have provided no basis for that assertion. Far from disagreement or confusion, decades of court of appeals decisions reflect a consistent and uniform understanding of the *Bivens* two-step

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[3] Language cited at Pet. 19 from a footnote in a concurrence in *Oestereich* v. *Selective Service System Local Bd. No. 11*, 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring in result), concerning review of a deprivation of personal liberty, had nothing to do with implied money-damage actions for constitutional violations, nor the scope of *Bivens*, a case not then decided. This Court subsequently emphasized that "there is not a damages remedy for every legal wrong." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 754-55 n.37 (1982).

analysis, as reiterated most recently in *Wilkie* v. *Robbins*—in which, indeed, this Court called it a "familiar sequence." 127 S. Ct. at 2598. *Arar* v. *Ashcroft*, 532 F.3d 157, 177, *reh'g granted* (2d Cir. 2008), cited by the petition as an example of "tremendous confusion in the lower courts," Pet. 15, referred rather to the "clear instructions of the Supreme Court."[4] Those instructions were applied, once again, by the District of Columbia Circuit here.

4. The Court of Appeals also properly recognized that concern about disclosure of sensitive intelligence information was sufficient reason to affirm the dismissal. The *Bivens* decision itself included the caveat that "[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. Decisions after *Bivens* "have responded cautiously to suggestions that *Bivens* remedies be extended." *Schweiker* v. *Chilicky*, 487 U.S. at 421. The present case, as the Court of Appeals recognized, plainly does involve such factors, and of a very serious nature.

The petition observes that "at least some of petitioners' claims do not concern secret information," Pet. 20 — implicitly acknowledging that others do. The complaint alleged, for instance, that in unspecified ways "Mrs. Wilson was impaired in her ability to carry out her duties at the CIA." C.A. Appx. 32. It

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[4] *Castaneda* v. *United States*, 546 F.3d 682, 688 (9th Cir. 2008), also cited by petitioners, simply applied to immigration detainees this Court's application in *Carlson* v. *Green*, 446 U.S. 14 (1980), of *Bivens* to a federal prison inmate. *Van Dinh* v. *Reno*, 197 F.3d 427, 432-34 (10th Cir. 1999), the third of petitioners' three examples, explicitly followed this Court's decision in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), and denied a *Bivens* claim. See Pet. 15.

alleged that she received "treatment different from that accorded to others similarly situated," *id.* at 33, and that this work was "secret and classified," *id.* at 19. It alleged that in the course of her duties she "risked her life for her country." *Id.* at 15. The complaint repeatedly made allegations concerning classified documents: *e.g.*, "[u]pon information and belief" a "memorandum . . . stamped 'Secret' . . . prefaced with the letters 'S/NF' meaning Secret/No Foreign." C.A. Appx. at 31. The District Court pointed out that to prove their claims "plaintiffs would need to introduce evidence pertaining to the Government's treatment of other covert agents whose espionage relationships have *not* been acknowledged—evidence that might reveal the identities of those agents." Pet. App. 93a (emphasis in original). It also noted that "resolution of these claims . . . might require an exploration into Mrs. Wilson's specific duties as a covert operative." Pet. App. 95a.

Not surprisingly, the Court of Appeals concluded that "[w]e certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents." Pet. App. 23a. Even when such concerns are absent, this Court has "consistently rejected invitations to extend *Bivens*." *Malesko*, 534 U.S. at 70. A petition seeking to do so in the sensitive and important area of intelligence matters is not an appropriate occasion for such unprecedented expansion. *Cf. Tenet* v. *Doe*, 544 U.S. 1, 11 (2005); *Totten* v. *United States*, 92 U.S. 105, 107 (1876) (rejecting "the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential"). "Even a small chance that some court will order disclosure of a [foreign-intelligence] source's identity

could well impair intelligence gathering . . . ." *CIA* v. *Sims*, 471 U.S. 159, 175 (1985).

5. There were several additional dispositive bases for dismissal that the courts below found unnecessary to reach. These included "that Mr. Wilson lacks standing to assert the First Amendment claim," Pet. App. 69a n.2; that the Intelligence Identities Protection Act, 50 U.S.C. §§ 421-26, providing penalties for disclosure of identities of covert agents, constitutes an additional congressional enactment precluding expansion of *Bivens*, see Pet. App. 88a-90a; that respondents had qualified immunity, see Pet. App. 97a; and that "the Supreme Court has confirmed that in certain circumstances the state-secrets doctrine provides insufficient protection for intelligence sources, and dismissal under *Totten* is required," Pet. App. 93a n.7, citing *Tenet*, 544 U.S. at 11.[5]

[5] The Court of Appeals also left undecided respondent Cheney's claim, supported by the United States, that as Vice President he was absolutely immune from such civil damage suits. See Pet. App. 28a n.3; *Cheney* v. *United States District Court*, 542 U.S. 367, 381, 386, 391-92 (2004); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753, 756 (1982). He further submitted that the complaint was not justiciable in that it sought to base liability on, *inter alia*, alleged communications between the President and the Vice President of the United States, C.A. Appx. at 25, and assignments and duties of agents in clandestine foreign-intelligence positions, *id.* at 32, 33. See Pet. App. 8a; *Baker* v. *Carr*, 369 U.S. 186, 217 (1962); *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005).

CONCLUSION

For the reasons stated herein and in the brief of the United States in opposition, the petition should be denied.

Respectfully submitted,

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